(1) Supreme Court, U.S.
FILED

No. 03 104 JUL 15 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Allison Alphonso Ross,

Petitioner

v.

University of South Carolina

On Petition For Writ of Certiorari
To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

Allison A. Ross
Pro Se
505 Quail Valley Road
Hopkins, South Carolina 29061
(803) 776-3005

36 pp

Questions Presented for Review

1. Did the lower Court err ruling the "statute of limitations" was not tolled pursuant to 28 USC 1367 (d); thereby, petitioner's claim was untimely and barred by the doctrine of res judicata and collateral estoppel?

2. Did the lower Court err in its ruling that the University of South Carolina's policy and procedures manual did not form a contract with petitioner?

Parties to the Proceeding/Rule 14.1(b)

The parties to the proceeding are Plaintiff, Allison A. Ross and Defendant, the University of South Carolina. Rule 29.6 does not apply.

TABLE OF CONTENTS

I. QUESTIONS PRESENTED i
II. PARTIES TO THE PROCEEDING.....ii
III. TABLE OF AUTHORITIES.....iv
IV. OPINIONS AND ORDERS.....1
V. BASIS FOR JURISDICTION
VI. CONSTITUTIONAL PROVISSIONS, TREATIES, STATUES, ORDINANCES AND REGULATIONS.....1
VII. FACTS OF THE CASE..... 1
VIII. ARGUMENT.....3
IX. CONCLUSION.....11

TABLE OF CITED AUTHORITIES

Cases

Arant v. Kressler 327 S.C. 225, 489 S.E. 2d 206 (1997).....3

Baril v. Aiken Regional Medical Centers (Opinon 3561 Heard October 8, 2002, filed October 28, 2002).....6, 9, 10

Brown v. Finger 240 S.C. 102, 124 S.E.2d. 781 (1962).....3

Conner v. City of Forest Arces 348 S.C. 454, 560 S.E. 2d 606 2002.....10

King v. PYA Monarch Inc. 1995 8

Ludwick v. This Minute of Carolina Inc. 287 S.C. 219, (1985).....6

Prescott v. Farmers Telephone Coop. Inc. No. 24984 (S.C. Ct. June 1999) Shearouse Adv. No. 19 9

Service v. Dulles 304 U.S. 363 7

Small v. Springs Industries Inc. 292 S.C. 481 (1987)...6, 7

Statutes

28U.S.C. § 1331.....1

28 U.S.C. § 1367(d).....1, 3

42 U.S.C. § 1981.....1

S.C. Law 8-17-310.....7

S.C. Law 8-17-330.....7

Citations of Opinions and Orders

The following is a list of the citations of opinions and orders entered in the case by courts or administrative agencies: 2000-CP-40-02241 "Petition for Writ of Certiorari Denied" by Jean H. Toal, Chief Judge South Carolina Supreme Court; Order Denying Petition For Rehearing by Judges Goolsby, Howard and Shuler; South Carolina Court of Appeals Unpublished Opinion No. 2002-UP-586 by Judge Goolsby, South Carolina Court of Appeals; Order Case No: OO-CP-40-2241 by Judge Jackson V. Gregory, South Carolina Circuit Court Fifth Judicial District

Basis For Jurisdiction

This is a civil action arising under 28 U.S.C. sections 1331,1367 and 42 USC section 1981. The Supreme Court of the State of South Carolina denied the petitioner's Petition for Writ of Certiorari on April 24, 2003. The Supreme Court has jurisdiction pursuant to U.S. Code 28 sections 1331, 1367 and 42 USC 1981.

Constitutional Provisions, Treaties, Statues, Ordinances and Regulations

The following constitutional provisions, treaties, statues, ordinances and regulations are involved in this case: 28 USC sections 1331,1367 and 42 USC section 1981. The pertinent text is outlined in the appendix.

Facts

Mr. Ross an African-American began employment with the University of South Carolina ("USC") on July 1982 and worked continuously until September 3, 1998. Mr. Ross served the mandatory six-month probationary period and became a classified state employee according to the South Carolina Code of Laws. Mr. Ross continued to progress within

the department and when a chance for promotion to Associate Director became vacant. Mr. Ross applied for the position. After the selection process was complete, Tom Battenhouse, a White male was awarded the position.

Mr. Ross, believing he was being discriminated against and after exhausting all administrative remedies; with the advise of an attorney, filed a discrimination complaint in United District Court for the District of South Carolina,

On June 1, 2000 Judge Joseph F. Anderson jr., Chief Judge United States District Court for the District of South Carolina, issued an Order in case C/A No.; 3 99-984-17BD. In his ruling Judge Anderson dismissed the petitioners pendent state claim with instructions petitioner had thirty days to file the state claim in the appropriate court of common pleas. [Appendix pg]

Mr. Ross on June 8, 2000, filed an action in South Carolina State Court against The University of South Carolina, an agency of the state. Mr. Ross alleged he had entered into valid and enforceable contract with the University for employment by virtue of the employee handbook/policies and procedures manual produced by the University. The University breached said contract by failing to adhere to criteria for discipline and or termination contained as outlined in its policy manual/handbook.

Mr. Ross sought compensatory damages against the University of South Carolina and such other actions and other damage and relief, as the court may deem appropriate, just and proper.

The Summary Court granted summary judgment to the University of South Carolina and petitioner appealed to SC Court of Appeals.

ARGUMENT

QUESTION 1

Did the lower Court err ruling the "statue of limitations" was not tolled pursuant to, 28 USC §1367(d); thereby petitioners claim was untimely and barred by the doctrine of res judicata and collateral estoppel?

The ultimate issue in this case is the lower Court's refusal to acknowledge the express language of the Law. In his order granting Summary Judgment, Judge Gregory ignores Mr. Ross's argument on 28 USC 1367. Mr. Ross presented testimony in his motion in Opposition to Summary Judgment and at the hearing [R pg 29] that his action was in accordance with Federal Law.

At the appellate level petitioner again argued that consideration be given to the Federal Law. [brief pg. 24-25]. Nevertheless, the Court of Appeals affirmed the decision of the lower court stating: The action with the Federal Court did not toll the statue of limitations. The petitioner's appeal was untimely and the issues raised were previously litigated and therefore barred by res judicata and collateral estoppel. [Affirmation]. Mr, Ross in his request for rehearing in an attempt to further convince the Court of the 1367 issue submitted letters from his attorney stating the statue of limitations were tolled in the present case. [Request for Rehearing].

The law does not support the decision rendered by the Court of appeals.

Where testimony is conflicting upon the application of the statute of limitations, the question becomes and issue of fact for the jury. Brown v. Finger, 240 S.C. 102, 124 S.E. 2d 781 (1962); Arant v.Kressler, 327 S.C. 225, 489 S.E. 2d 206 (1997). The appellant filed a federal claim against the University of South Carolina for retaliation and violation of

First Amendment rights. This federal claim included a pendant state claim for breach of contract.

The Recommendation from Magistrate Marchant and cited in Judge Anderson's Order reads:

> "If the District Court adopts the recommendations made herein with regard to Plaintiffs two remaining federal claims, Plaintiffs pendant state law claim, which is asserted only against the Defendant University of South Carolina, will be the only claim remaining in this lawsuit. When federal claims presented in a case originally filed in federal court are dismissed, any remaining states claims should also be dismissed, without prejudice, for resolution in state court under the general doctrine developed in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). See In Re Conklin, 946 F.2d 306, 324 (4th Cir, 1991); Mills v. Leath. 709 F. Supp. 671,675-676 (D.S.C. 1988); Carnegie-Melon v. Cohill 484 U.S. 343 (1988); Carnegie-Melon v. Cohill 484 U.S. 343 (1988); Taylor v. Waters, 81 F . 3d 429, 437 (4th Cir. 1996). Dismissal of this remaining state law cause of action will not only allow the more appropriate court to rule on this exclusively state claim, but will not prejudice the parties, as the

> parties may seek a fast track for resolution of this claim at the state level. See Rule 40 (c), S.C.R.C.P. Further, this Court is also not required to retain supplemental jurisdiction over this remaining state law claim on grounds that the state statute of limitations for bringing this claim may have now expired. Federal law provides for tolling of state statutes of limitations for state claims during the period they were pending in federal court and for thirty (30) days afterwards. See 28 U.S.C.A.S 1367(d); Hedges v. Musco, et.al., 204 F.3d 109, 123-124 (3rd Cir. 2000); Beckv.Prupis, 162 F 3d 1090, 1099-1100 (11th Cir. 1998) ["a dismissal under section 1367 tolls the statute of limitations on the dismissed claims for 30 days"]; Seabrook v. Jacobson, 153 F. 3d 70, 72 (2d Cir. 1998)["Section 1367 (d) ensures that the plaintiff whose supplemental jurisdiction is dismissed has at least thirty days after dismissal to refile in state court."] (Appendix pg.17a)

The appellant's pendant state claim was dismissed without prejudice on June 2, 2000, and the appellant filed in the Richland county court on June 8, 2000. The appellant explained this process to the lower court and outlined the rules of supplemental jurisdiction on the issue [transcript of the hearing: Record at 15, 19, 26]. ("[Dismissal...without prejudice' is a dismissal that does not' operat[e] as an adjudication upon the merits,' and thus does not have a res judicata effect.") (alterations in original) (citation omitted) (construing language of Fed. R. Civ. P. 41 (a)).

QUESTION 2

Did the Lower err ruling the University's Policy and Procedures Manual did not Form a contract with Mr. Ross?

At Summary Judgment Judge Gregory (l) stated "finally this Court is unpersuaded that plaintiff has presented any evidence that a contract existed between himself and the University". Petitioner refutes this decision. Petitioner directs the Court's attention to Petitioner's Opposition to Summary Judgment [R. Opposition to Summary Judgment pg 2-3.] Petitioner also directs the Court's attention to Small v. Springs Industries. Inc. 292 S.C. 481 (1987) and Baril v. Aiken Regional Medical Centers (Opinion 3561, Heard October 8, 2002, filed October 28, 2002). The Supreme Court should note that Judge Gregory was the lone dissenting judge in Smalls v Spring Industries Inc. 292 S.C. 481 (1987).

In Ludwick v. This Minute of Carolina Inc., 287 S.C. 219, (1985), the South Carolina Supreme Court joined an increasing number of courts that have questioned the continued viability of the employment at will doctrine. In Ludwick. the Court recognized our first exception to the "at-will" doctrine when it formally recognized a cause of action called "wrongful discharge in violation of public policy" when the employer terminated an employee for duly honoring the subpoena of a state administrative board. Two years after the Ludwick case, the South Carolina Supreme Court in Small v. Springs Industries. Inc., 292 S.C. 481 (1987), allowed an employee to rebut the at will presumption and hold the employer liable for breach of contract.

Kathy Small had worked at Springs Industries for five years when the company issued a **handbook** and bulletin to its employees. That handbook and bulletin detailed the company's progressive discipline procedure for terminating an employee. Those documents provided for a four-step disciplinary procedure that consisted of a verbal reprimand, a written warning, a final written warning and discharge. Also, Small's supervisor orally assured the employees that the four-step process would be uniformly applied.

In spite of these promises, Springs Industries discharged Small after only one written warning. Small sued the company under **breach of contract** and the trial judge allowed the jury to determine whether the handbook, the bulletin and the oral assurances by Small's supervisors altered the otherwise at-will employment relationship. At the trial of the matter, the jury found for Small and awarded her $300,000 for breach of the employment contract When Springs appealed, the South Carolina Supreme Court affirmed the jury's finding. University policies H.R.1.36 and H.R. 1.39 for progressive discipline and termination procedures were not followed [R. 223-239]. The issue of existence of a contract is a question of fact for the jury when its existence is questioned and the evidence is either conflicting or gives rise to more than one inference Small v. Springs Indus. Inc.. 292 S.C. 481, 357 S.E 2d 452 (1987). Additionally, "if dismissal from employment is based on a defined procedure...that procedure must be scrupulously observed". Service v. Dulles, 304 U.S. 363.

Additionally, the appellant cited S.C. Law 8-17-310 and 8-17-330, which establishes the petitioner as a covered employee vested in the state system. The respondents state that the petitioner did not read the policies and procedures before employment. However, no state employee does. S.C. Law 8-17-330 states "a copy of the approved agency grievance procedure must be made available to covered employees of the agency". The law provides each state employee protection from adverse punishment by requiring a procedure of progressive discipline and state grievance procedures.

The respondent's cite "just cause". However, determining "just cause" is a question of fact to be determined in each particular circumstance and employment situation. The employee's conduct should be judged not only by the individual action but also by his past conduct and length of service that helps to put any individual act of alleged misconduct in context. In situations of deteriorating

performance, before dismissing on this ground and alleging, "just cause" the courts in these circumstances have implied a general duty on the employer to warn the employee about his performance or lack thereof and need to improve. The petitioner received no warnings that he would be terminated for failure to remove a putting green from his office or keep his office door open [R. 194-200] & [R. 225-226]. The employer must also give the employee sufficient time for the employee to improve before there will be grounds to dismiss the employee summarily upon the ground of "just cause". The warning to the employee must be clear and unequivocal, which in general requires, the warnings to be in writing. Petitioner received no warnings. Gene Luna of the University of South Carolina admits that there were no warnings given. [R.195-200].The employer must also outline to the employee the steps needed to be taken to improve and recommend to the employee areas in which the employee could improve upon. Petitioner received no information regarding areas for improvement. The employer who gives the employee a period of time to improve cannot dismiss during this trial period on the grounds of "just cause". If the employer has knowledge of misconduct, incompetence or any other transgression of the employee and condones such conduct it cannot use such conduct as grounds for dismissal on the basis of "just cause". The University of South Carolina did not comply with these provisions. These are issues are issues for jury determination.

Furthermore, in King v. PYA Monarch, Inc., (1995), the South Carolina Supreme Court held that an employer who voluntarily chose to (1) publish "Rules and Regulations" and (2) orally assure employees that company policies and procedures would be followed cannot deviate from such assurances at its pleasure. Most recently, the South Carolina Supreme Court held that a contract altering the at- will arrangement may arise, in part, from the oral statement of the

employer arising to an oral contract of definite employment. Most employment contracts are unilateral; hence, to establish the existence of a definite contract of employment by unilateral contract, the employee must establish: (1) a specific offer; (2) communication of the offer to the employee; (3) performance of job duties reliance on the offer. Prescott v. Farmers Telephone Coop., Inc., No. 24948 (S.C. Sup. Ct. June 1,1999) (Shearouse Adv. Sh. No. 19). The appellant had sixteen years of satisfactory service with the University of South Carolina and each year the plaintiff signed an E.P.M.S. form describing job duties and outlining what was to be completed. These facts constitute a contract under Prescott.

Additionally, in this case, a jury should have had the opportunity to review the decision to not adhere to policy by using progressive discipline, to skip the oral warning, the written warning, and the suspension, and instead resort to dismissal. The supervisor was under the impression that he had the power to deviate from the contract formed by University policies H.R. 1.36 and 1.39 and determine that appellant actions were insubordination to justify termination. Battenhouse admitted that he was not the chair of the department making the letter of termination illegal in accordance with H.R. 1.39. The supervisor bypassed the oral warning, the written reprimand, the suspension, and went to the most severe punishment-termination. This is breach of contract. This issue and the issue of whether the handbook formed a contract should have been submitted to a jury.

In October 2002, The Supreme Court reversed and remanded a South Carolina case. Baril v. Aiken (Opinion 3561, Heard October 8, 2002, Filed October 28, 2002) was reversed and remanded by the Supreme Court. The questions are similar to those posed by petitioner Ross regarding circuit court error in granting summary judgment on the issues of

policy and procedure and breach of contract. Baril maintained that the Circuit court erred in granting summary judgment because, viewing the evidence in the light most favorable to Baril as the non moving party, material issues of fact exist concerning whether the hospital's written policies and procedures created an actual contract between Baril and the Hospital.

Because an employee handbook may create an employment contract, the question of whether a contract exists is for a jury when its existence is questioned and the evidence is either conflicting or admits of more than one inference. Conner v. City of Forest Acres, 348 S.C. 454. 560 S.E.2d 606 (2002) (stating summary judgment is inappropriate in most instances when handbook contains both a disclaimer and promises). The petitioner's brief pages 9-11 outline several statements of law with regard to summary judgment. The petitioner also outlines several questions in the brief that provide that there is a genuine issue of fact, that further inquiry into the facts is desirable, and that there is a dispute over evidentiary facts.

CONCLUSION

Upon the foregoing reasons, the Court should Grant as a matter of Law this Writ of Certiorari.

Respectfully submitted

Allison A. Ross

Allison A. Ross, pro se

Dated: July 15, 2003.